TOON CIRCUIT, SITTING EN BANC

No. 1962-TOON-0442

People v. Le Pew

18 F.C. App. 302 (Toon Cir. 1963) (en banc)

On appeal from the Backlot District · Decided May 17, 1963 · Bunning, J., for the Court · CARROT, J., concurring

Facts inspired by For Scent-imental Reasons (1949), Touché and Go (1957), and the Pepé Le Pew shorts (1949–1962); law inspired by People v. Mayberry (Cal. 1975) and People v. Falck (Cal. App. 1997).

FICTIONAL LEGAL SATIRE. NOT LEGAL AUTHORITY.

SYLLABUS

Defendant was convicted of stalking, battery, sexual battery, false imprisonment and assault arising from a fourteen-year pursuit of Penelope Pussycat across several jurisdictions. Held: (1) flight is not flirtation; a course of conduct is judged as a reasonable person would perceive it, not as the pursuer narrates it; (2) a mistake as to consent must be reasonable as well as honest, and confidence repeated is not reasonableness; (3) a kiss imposed on a person trying to leave is an offensive touching; (4) a body may confine as effectively as a wall; (5) the reason a person refuses contact is immaterial, and the odor defense fails on its own premise; (6) occasional reciprocal pursuit does not supply retroactive or perpetual consent; (7) Sylvester v. Gonzales describes an occupation and legalizes none of its methods; (8) the assault count merges into the battery. Affirmed in part, vacated in part, and remanded for a corrected abstract.

HEADNOTES

[1] 90GAG646(1) · **Criminal Law: Stalking.** Flight is not flirtation. Repeated unwanted following is judged by the course of conduct as a reasonable person would perceive it. A person who runs away has communicated that she would prefer the pursuer remain somewhere else.

[2] 90GAG26(3) · **Criminal Law: Mistake as to consent.** The belief must be honest and reasonable. A mistake concerning consent cannot become reasonable merely because it is repeated with confidence.

[3] 90GAG242(2) · **Criminal Law: Battery.** Offensive touching. The same kiss that is affectionate when welcomed is battery when imposed on someone actively attempting to get away.

[4] 90GAG236(1) · **Criminal Law: False imprisonment.** Restraint, not architecture. No rope, tower or locked cell is required. A body may serve as effectively as a wall.

[5] 50GAG4(2) · **Consent: Reason for refusal immaterial.** Consent asks whether the contact was welcomed, not whether a court approves the reason it was not.

[6] 150GAG12(6) · **Occupations: No license from status.** Professional status describes the activity; it does not legalize every means employed in its performance. Sylvester applied and limited.

OPINION · BUNNING, J., FOR THE COURT

¶ 1 BUNNING, J. Defendant Pepé Le Pew appeals from judgments entered following a jury trial at which he was convicted of stalking (Toon Pen. Code, § 646.9), repeated offensive battery (§§ 242, 243), false imprisonment (§ 236), sexual battery (§ 243.4), and assault (§ 240), arising from his prolonged pursuit of Penelope Pussycat.

¶ 2 Defendant does not substantially dispute what occurred. He disputes what it meant. According to defendant, his conduct constituted courtship. According to Ms. Pussycat, it constituted approximately fourteen years of running away. The jury was entitled to resolve that disagreement. Except as to a duplicative assault conviction, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 Because defendant challenges the sufficiency of the evidence, we review the whole record in the light most favorable to the judgments and determine whether it contains evidence that is reasonable, credible, and of solid value from which a rational trier of fact could find the essential elements beyond a reasonable doubt. Rogers v. Mystery Inc. , 16 F.C. App. 45, 51 (Newt. Cir. 1961) ("An appellate court does not remove the mask merely because it might have suspected a different caretaker."). Questions of credibility, conflicting inferences, and the reasonable interpretation of conduct belong principally to the jury. Id. at 52.

A. The Parties

¶ 4 Defendant is an adult male skunk who styles himself a romantic sophisticate of French extraction. The record suggests that the latter characterization is, at minimum, overstated.

¶ 5 Ms. Pussycat is an adult black cat. From time to time, and through circumstances not of her choosing, Ms. Pussycat acquired a white stripe running lengthwise along her back. Defendant repeatedly interpreted this marking as establishing that she was a female skunk. That mistake explains defendant's initial approach. It does considerably less to explain everything that followed.

II. THE COURSE OF CONDUCT

¶ 6 The prosecution introduced evidence of numerous encounters occurring over a period of years in France, North Africa, the Alps, various maritime locations, and several jurisdictions whose precise sovereignty the record does not disclose. Although the details varied, the pattern was remarkably consistent. Defendant would observe Ms. Pussycat. Defendant would declare himself instantly and profoundly in love. Ms. Pussycat would flee. Defendant would follow. When he caught her, he would embrace, restrain, or kiss her. Ms. Pussycat would struggle free. Defendant would construe the escape as encouragement. He would resume the pursuit. This cycle ordinarily continued until one or both parties fell from a cliff, entered a body of water, collided with a structure, or otherwise became temporarily unavailable.

A. The Perfume Shop Incident

¶ 7 The earliest charged conduct occurred inside a perfume shop. Ms. Pussycat attempted repeatedly to evade defendant. Defendant followed her through the establishment, blocked avenues of escape, seized her, and kissed her. When Ms. Pussycat again fled, defendant did not understand the conduct as rejection. Instead, he announced, in substance, that her retreat demonstrated romantic coyness. At one point defendant produced a firearm, placed it near his own head, moved outside Ms. Pussycat's view, and caused a gunshot to be heard. Ms. Pussycat, apparently believing defendant had injured himself, returned. Defendant immediately revealed himself unharmed, announced that he had fortunately missed, and resumed his advances.

¶ 8 The prosecution characterized the episode as emotional coercion. Defendant characterized it as "ze grand gesture." The jury chose the prosecution's characterization.

B. The Seaside Pursuit

¶ 9 Several years later, defendant encountered Ms. Pussycat near a beach. He seized her and kissed her repeatedly while she struggled. After freeing herself, Ms. Pussycat ran. Defendant grabbed her tail and allowed himself to be dragged behind her. She escaped again. Defendant continued pursuit. Ms. Pussycat eventually entered the ocean wearing underwater breathing equipment. Defendant followed her beneath the surface. After an extended underwater chase, Ms. Pussycat reached an island. Defendant was waiting there.

¶ 10 The prosecution introduced this evidence principally on the stalking count. Defense counsel objected that "following a woman to the bottom of the ocean cannot reasonably be characterized as following her home."

¶ 11 The trial court overruled the objection. Correctly so. Section 646.9 contains no bathymetric exception.

C. The Recurring Pattern

¶ 12 Other incidents followed the same general structure. Ms. Pussycat hid. Defendant found her. She ran. He pursued. She barricaded doors. He entered through windows. She crossed national boundaries. He crossed them also. She climbed mountains. He climbed after her. Where ordinary locomotion proved insufficient, defendant employed skis, boats, automobiles, parachutes, and other instrumentalities. At various points Ms. Pussycat leapt from buildings, entered deep water, and subjected herself to substantial physical danger in order to put distance between herself and defendant. Defendant consistently interpreted these acts as manifestations of romantic desire.

¶ 13 That interpretation forms the central issue on appeal.

III. DISCUSSION

A. Stalking

¶ 14 Section 646.9, subdivision (a), provides in relevant part:

¶ 15 A "course of conduct" means "two or more acts evidencing continuity of purpose." (§ 646.9, subd. (f)(1).) Defendant contends that the evidence was insufficient because he believed Ms. Pussycat welcomed his attentions. The contention fails for two independent reasons. First, the statute contains an objective component. Second, defendant's asserted belief was not one a rational jury was required to credit. A victim need not await the pursuer's announcement of his intentions where persistence, repeated reappearance, and relentless pursuit have already made the danger evident. The relevant inquiry is the course of conduct as perceived by a reasonable person, not the pursuer's private characterization of himself as merely watching.

¶ 16 The principle applies with particular force here. Ms. Pussycat did not merely decline defendant's advances verbally. She fled from him with such frequency, urgency, and geographic scope that her movements constitute much of the evidentiary record. At various times she ran from buildings, crossed beaches, entered the ocean, climbed mountains, hid behind locked doors, and propelled herself away from defendant by whatever means happened to be available. Defendant nevertheless characterizes these acts as "playful pursuit."

¶ 17 The law does not. Flight is not flirtation. Nor does persistence transform refusal into invitation. Repeated rejection does not mature into consent through the passage of time, the presentation of flowers, or the suitor's unusually favorable opinion of himself. A person who runs away has communicated at least one proposition with unusual clarity: She would prefer that the pursuer remain somewhere else.

¶ 18 The stalking conviction is supported by substantial evidence.

B. Defendant's Claimed Mistake Concerning Consent

¶ 19 Defendant's principal argument is that he genuinely believed Ms. Pussycat desired him. The record contains considerable support for the proposition that defendant believed this. That is not the same thing as support for the proposition that the belief was reasonable.

¶ 20 Under section 26, subdivision Three, a mistake of fact negates criminal intent only where the mistake is both honestly held and reasonable under the circumstances when the offense requires absence of consent. The accused's confidence in his interpretation of social signals is not itself evidence that the interpretation was reasonable. The law evaluates consent from the conduct of the person whose consent is required, not from the romantic narrative composed by the person seeking it. Defendant repeatedly supplied his own interpretation to conduct whose ordinary meaning was unmistakable. When Ms. Pussycat ran, defendant concluded that she wished to be chased.

¶ 21 When she locked a door, he regarded the barrier as an invitation to find another entrance. When she struggled during an embrace, he described her as passionate. When she escaped into the ocean with breathing apparatus, defendant apparently inferred that she wished to continue the courtship underwater. A mistake concerning consent cannot become reasonable merely because it is repeated with confidence.

¶ 22 The jury was properly instructed that defendant could rely upon an actual and reasonable belief in consent. It was equally properly permitted to conclude that defendant's belief satisfied only the first half of that formulation.

C. Battery

¶ 23 Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another." "Force or violence" requires no injury. Any intentional touching may suffice if done in a harmful or offensive manner and without consent. Battery doctrine protects bodily autonomy rather than merely freedom from physical injury; the law does not require the complainant to be bruised, concussed, or visibly strangled before recognizing an unwanted touching as offensive. See Brown v. Flashman, 1 F.C. App. 61, 64 (Newt. Cir. 1857) (holding a kick customary on the playing field a battery in the schoolroom, because "consent of that kind is read from the occasion, and occasions end").

¶ 24 The record here contains numerous intentional touchings. Defendant grabbed Ms. Pussycat. He restrained her. He embraced her while she struggled to escape. He seized her tail to prevent her departure. He repeatedly kissed her without obtaining permission.

¶ 25 Defendant argues that kissing is ordinarily affectionate rather than harmful. That misses the point. A touching may be criminal because it is offensive, and whether an intimate touching is offensive depends materially upon consent.

¶ 26 The same kiss that is affectionate when welcomed may constitute battery when imposed on someone actively attempting to get away. The battery convictions therefore stand.

D. Sexual Battery

¶ 27 Section 243.4, subdivision (e), prohibits intentional touching of another person's intimate parts, or other intimate physical contact specified by statute, when undertaken for sexual gratification, arousal, or abuse and without the person's consent. For purposes of the provision, subdivision (g)(4) expressly includes nonconsensual kissing accomplished while the victim is restrained.

¶ 28 Defendant argues that his conduct was "romantic rather than sexual." We confess some difficulty understanding the distinction defendant proposes. Defendant's own contemporaneous declarations repeatedly described Ms. Pussycat as the object of his passionate desire. He pursued her for the purpose of physical affection. He embraced her against her will. He kissed her while she struggled to leave.

¶ 29 The jury could readily infer the requisite purpose. The law does not prescribe conventional standards of intimacy. Conduct others might regard as alarming may be entirely consensual between particular parties. The indispensable element is not normality. It is agreement. That principle cuts against defendant, not in his favor.

¶ 30 Ms. Pussycat was free to welcome unconventional courtship. She was equally free not to. The evidence established the latter. The sexual-battery convictions are affirmed.

E. False Imprisonment

¶ 31 Section 236 defines false imprisonment as "the unlawful violation of the personal liberty of another." Actual incarceration is unnecessary. Restraint may be accomplished by physical force, menace, obstruction, or any other means by which a person's freedom of movement is intentionally and unlawfully restricted.

¶ 32 The leading authority is Rapunzel v. Gothel , 11 F.C. App. 410, 416 (Ench. Cir. 1959), which rejected the argument that false imprisonment requires a conventional jail:

¶ 33 See also Dalmatians v. De Vil , 15 F.C. App. 99, 106 (Newt. Cir. 1961) (confinement established where victims were physically retained on premises for purposes of defendant's private scheme notwithstanding absence of individual locked cells).

¶ 34 The evidence here showed that defendant repeatedly pinned Ms. Pussycat in corners, blocked exits, held her in his arms as she attempted to escape, and pursued her into spaces from which ordinary escape became impossible. The perfume-shop episode is particularly instructive.

¶ 35 Ms. Pussycat attempted to distance herself from defendant inside a confined commercial establishment. Defendant repeatedly intercepted her movements. At various moments, furniture, walls, doors, and defendant himself left her with no readily available route of departure.

¶ 36 No rope, handcuff, tower, or locked cell is required. A body may serve as effectively as a wall. Defendant's body frequently did.

F. The Odor Defense

¶ 37 Defendant advances one argument requiring somewhat more discussion. He contends that Ms. Pussycat fled not because she objected to his romantic advances, but because of his exceptionally powerful odor. From this premise he reasons that the prosecution failed to establish nonconsent to the physical contact itself.

¶ 38 The argument is ingenious. It is also wrong. The reason a person refuses physical contact is ordinarily immaterial. One may decline a kiss because one dislikes the suitor's personality, appearance, politics, table manners, conversational habits, or smell.

¶ 39 The law does not require a sufficiently dignified reason. Consent asks whether the contact was welcomed. It does not ask whether a court approves the reason it was not.

¶ 40 The Enchanted Circuit reached a related conclusion in Eeyore v. Tigger , 10 F.C. App. 114, 119 (Ench. Cir. 1958), holding that an individual's general temperament does not diminish his right to refuse unwanted physical contact: "One's aversion need not be cheerful, articulate, or socially convenient to be legally effective."

¶ 41 Thus, even accepting defendant's factual premise entirely, his legal conclusion does not follow. If Ms. Pussycat fled because defendant smelled intolerable, she was still fleeing.

¶ 42 Indeed, the odor evidence arguably strengthens the prosecution's case. Defendant knew that his presence produced immediate physical aversion in virtually every creature he encountered. Birds fell from trees. Flowers wilted. Human beings abandoned rooms. On occasion, armed criminals voluntarily surrendered to police after approaching him.

¶ 43 Yet defendant asks us to hold that when Ms. Pussycat fled with comparable urgency, he reasonably understood the behavior as romantic encouragement. The jury was not required to accept that proposition.

G. Evidence of Occasional Reciprocal Pursuit

¶ 44 Defendant places substantial reliance upon several incidents in which Ms. Pussycat later pursued him. The evidence showed that, on rare occasions when defendant's odor was temporarily neutralized or their circumstances otherwise changed, Ms. Pussycat demonstrated attraction and reversed the pursuit.

¶ 45 This evidence was properly admitted. It does not compel reversal. Consent is contextual and temporal. Section 261.6 provides that consent must be "positive cooperation in act or attitude pursuant to an exercise of free will," and may be withdrawn at any time. A person's willingness to pursue someone on Tuesday does not retroactively authorize unwanted contact on Monday. Nor does attraction to a person under one set of circumstances establish perpetual consent to physical contact under all others.

¶ 46 Prior affection may illuminate a relationship. It does not operate as a continuing warrant. Even within longstanding intimate relationships, consent remains act-specific.

¶ 47 The trial court therefore accurately instructed the jury:

¶ 48 That proposition requires no cartoon-specific exception.

¶ 49 Defendant next invokes Sylvester v. Gonzales , 12 F.C. App. 1 (Toon Cir. 1955), contending that longstanding pursuit may constitute a lawful profession. The citation is accurate. The conclusion is not. Sylvester held that persistent predatory pursuit could constitute employment for purposes of occupational law. It did not hold that an occupation supplies immunity from generally applicable criminal statutes. Indeed, Sylvester expressly warned:

¶ 50 Id. at 7. The principle is well established elsewhere. A hunter may lawfully hunt and still commit trespass. Fudd v. Bunny , 6 F.C. App. 12, 19 n.8 (Toon Cir. 1951). A professional wrestler may lawfully strike an opponent during a match and commit battery by doing the same thing in a grocery store. A locksmith may lawfully open locks and still commit burglary when he opens the wrong one for the wrong reason. McDuck v. Beagle Boys , 9 F.C. App. 404, 411 (Newt. Cir. 1957). And an individual may regard himself as a professional lover without acquiring a professional license to kiss unwilling strangers.

I. Prior-Acts Evidence

¶ 51 Defendant additionally contends the trial court erred by admitting evidence of encounters predating the charged offenses. The evidence was admitted under Toon Evidence Code section 1101, subdivision (b), for the limited purposes of proving knowledge, absence of mistake, and the existence of a common plan or course of conduct.

¶ 52 There was no abuse of discretion. Where a defendant claims repeatedly to have misunderstood flight, physical resistance, locked doors, concealment, and international

relocation as signs of romantic interest, prior instances in which he interpreted substantially identical conduct in substantially the same manner are probative of whether the latest asserted misunderstanding was reasonable. See Road Runner v. Coyote , 8 F.C. Dist. 55, 63 (Painted Desert Dist. 1954) ("One failed inference may be mistake. The same inference drawn from the same contrary evidence hundreds of times may properly be considered something else.").

¶ 53 The trial court also conducted the balancing required by Evidence Code section 352 and excluded several cumulative incidents. No reversible error appears.

J. Merger of the Assault Count

¶ 54 We agree with defendant on one narrow point. The jury convicted defendant under section 240 of assault based upon an episode in which he lunged toward Ms. Pussycat immediately before grabbing and kissing her.

¶ 55 Section 654 prohibits multiple punishment for an indivisible act or course of conduct undertaken with a single criminal objective. See Coyote v. Desert Revenue Service , 3 F.C. Tax 45, 63 n.14 (Toon Cir., Tax Div. 1956) (noting in dicta that "even the law of cartoons occasionally refuses to count the same explosion twice").

¶ 56 Because the same indivisible act formed the basis for the completed battery conviction, separate punishment for the assault cannot stand. The assault conviction is therefore vacated as a lesser included offense. This affects neither the remaining convictions nor the aggregate sentence imposed.

IV. A WORD ABOUT ROMANCE

¶ 57 Defendant's briefs repeatedly invoke romance. He describes himself as persistent. The prosecution describes him as relentless. The difference is not merely semantic.

¶ 58 Romantic pursuit occupies a peculiar place in storytelling. Literature, film, and song are filled with suitors who refuse discouragement, overcome barriers, and eventually discover that perseverance has been rewarded.

¶ 59 Criminal law operates under a different convention. It does not recognize an exception for charming accents, violins, flowers, moonlight, Parisian scenery, expensive dinners, standing outside a bedroom window with a stereo, or confidence in one's own irresistibility. Grand gestures are governed by the same law of consent as small ones.

¶ 60 The question is not whether defendant believed himself romantic. He plainly did. The question is whether the person he pursued consented to being pursued, restrained, and touched. On the occasions charged here, the jury found she did not. Substantial evidence supports that finding.

¶ 61 One final point warrants emphasis. Defendant repeatedly insists that Ms. Pussycat's efforts to escape were part of "the game." They were not his to characterize. A courtship does not arise merely because one participant has decided there are two participants. Or, stated more generally: A person being pursued does not become a participant in a courtship merely because the pursuer has written a courtship narrative around the pursuit.

V. DISPOSITION

¶ 62 The conviction for assault under section 240 is vacated as merged into the corresponding battery conviction. The judgments of conviction for stalking (§ 646.9), battery (§ 242), sexual battery (§ 243.4), and false imprisonment (§ 236) are AFFIRMED .

¶ 63 The matter is remanded solely for preparation of a corrected abstract of judgment. So ordered.

CONCURRENCE · CARROT, J.

¶ 64 CARROT, J., concurring. I join the Court's opinion in full. I write separately only because defendant's appellate counsel suggested at oral argument that affirmance would "criminalize persistence." It does not. Persistence remains lawful. So do affection, admiration, flirtation, courtship, serenades, flowers, perfume, French accents, boomboxes held overhead, extravagant self-confidence, and profoundly ill-advised declarations of love.

¶ 65 What the law requires is a distinction defendant persistently failed to grasp: You may keep asking. You may not keep grabbing. I concur.

EDITOR'S NOTE

Drafted by machine in the voice of Judge Bunning. Edited and entered for the Court by M. Throckmorton , a member of the bench and bar.

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